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Secretary
Federal Communications Commission
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JAN - 4 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 92-259
Broadcast Signal Carriage Issues

Dear Ms. Searcy:

Transmitted herewith on behalf of Educational
Broadcasting Corporation, licensee of noncommercial educational
television station WNET, Newark, New Jersey, are an original and
nine copies of its Comments in the above-referenced proceeding.

Respectfully submitted,

Barbara K. Gardner

Barbara K. Gardner

Enclosures

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BEFORE THE
Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Cable Television)
Consumer Protection and Competition Act) MM Docket No. 92-259
of 1992)
)
Broadcast Signal Carriage Issues)

To: The Commission

**COMMENTS OF
EDUCATIONAL BROADCASTING CORPORATION**

Educational Broadcasting Corporation, licensee of noncommercial educational television station WNET, Newark, New Jersey ("EBC" or "WNET"), hereby responds to the Commission's Notice of Proposed Rule Making (FCC 92-499, released November 19, 1992) ("Notice") in the captioned proceeding. We address only the issue of when the Commission should grant noncommercial status, for purposes of determining eligibility for the carriage rights accorded noncommercial educational stations by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), to educational television stations such as WNET that operate on channels not reserved for noncommercial use. WNET strongly urges the Commission to rule that **all** stations meeting the criteria set forth in Section 5(1)(1)(A) or (B) of the 1992 Cable Act are eligible for carriage as qualified noncommercial stations, regardless of whether they operate on reserved or nonreserved channels.

INTRODUCTION

The 1992 Cable Act defines a "qualified noncommercial educational television station" as

any television broadcast station which--

- (A) (i) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association; and
- (ii) has as its licensee an entity which is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in section 396(k)(6)(B); or
- (B) is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.

47 U.S.C. § 615(1)(1) (1992). As pointed out in the comments of America's Public Television Stations at 8, nowhere in the above definition is there any requirement that a qualified station must be operating on a channel reserved for noncommercial use.

Nevertheless, the statute also states that "[s]uch term includes" certain translators; those full-service stations or translators operating on reserved channels; "and (III) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial

educational stations." Id. Accordingly, the Commission seeks comment as to how it should implement this directive. Notice at ¶ 8.

DISCUSSION

As the Commission observed more than three decades ago in approving the assignment of the license for nonreserved channel 13 (Newark, New Jersey) to EBC's corporate predecessor, "[t]here is no requirement that a commercial channel be employed solely for commercial purposes." NTA Television Broadcasting Corp., 44 F.C.C. 2563, 2564 (1961) (citation omitted). Indeed, the "most obvious benefit" to be derived from the requested assignment of nonreserved channel 13, the FCC noted, "is that the station, as proposed to be operated by [EBC's predecessor-in-interest], would provide the more than 15,000,000 people in the service area with their first comprehensive VHF noncommercial educational service."^{1/}

To this day, the Commission does not require new noncommercial licensees to operate only on reserved channels. See 47 C.F.R. § 73.621 (establishing eligibility requirements for noncommercial educational TV stations without mention of channels

^{1/} Id. (emphasis added). As the Commission is aware, WNET has more than fulfilled the high expectations of the FCC in this regard. One of the largest public broadcasters in the United States, it produces or co-produces (in addition to local programming) such acclaimed nationally-broadcast programs as "The MacNeil/Lehrer NewsHour," "Nature," and "Great Performances."

of operation); FCC Form 340, Application for Construction Permit for Noncommercial Educational Broadcast Station (Feb. 1992) (no mention of required channels of operation).

Similarly, the eligibility criteria for community service grants established by the Corporation for Public Broadcasting pursuant to Section 396 of the Communications Act neither exclude stations operating on nonreserved channels, nor establish special requirements for such stations. And, as previously noted, the noncommercial eligibility criteria contained in Section 5(1)(1) of the 1992 Cable Act, 47 U.S.C. § 615(1)(1), contain no requirement that qualified stations operate on reserved channels. In short, Congress, the Commission, and the Corporation for Public Broadcasting do not require unique treatment for noncommercial licensees such as WNET that utilize nonreserved frequencies.

At the same time, in enacting Section 5 of the 1992 Cable Act, Congress has determined that mere operation on a **reserved** channel does not automatically confer eligibility for cable carriage as a noncommercial station: **all** stations seeking to qualify for such carriage must hold a noncommercial FCC license, be owned and operated by a public or nonprofit entity, and be eligible for community service grants (or be a municipally-owned station transmitting a predominantly noncommercial educational program service).

Accordingly, the most appropriate way for the Commission to assure that its implementation of the statutory mandate is consistent with Congress' intent is to require stations operating on nonreserved channels to meet the same tests set forth in the statute as those operating on reserved channels must satisfy. **Any station satisfying the quoted Section 5(1)(1) criteria should be deemed qualified for carriage as a noncommercial educational station.**

In most if not all cases, noncommercial educational stations operating on nonreserved channels will have already established their eligibility to the same extent as stations assigned to reserved channels have. For example, EBC holds an FCC license for noncommercial operation, is owned and operated by a nonprofit organization chartered by an arm of the State of New York, and is eligible for, and receives, community service grants, thereby satisfying all of the statutory requirements for carriage as a noncommercial station.^{2/} Thus, EBC's proposal that the FCC rule that all stations satisfying the statutory criteria are qualified for carriage as noncommercial stations is also the most efficient way for the Commission to fulfill Congress' directive, because it does not require the agency to

^{2/} WNET understands that there are other noncommercial stations operating on nonreserved television channels that may also be eligible for Section 5 carriage rights under the statutory criteria.

devise any new tests, or to conduct any evaluations unique to stations operating on nonreserved channels.

CONCLUSION

The Commission should rule that if a station satisfies the several tests for a "qualified noncommercial educational television station" set forth in Section 5(l)(1) of the 1992 Cable Act, it is eligible for cable carriage as a noncommercial station, whether or not it operates on a reserved channel. Any other result is contrary to Congress' intent and the Commission's own precedents, would unfairly penalize WNET and all other similarly-situated licensees, and would disserve the public interest by selectively limiting viewers' access to noncommercial educational television broadcasting.

Respectfully submitted,

EDUCATIONAL BROADCASTING
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